

ORIGINAL

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )

Computer III Further Remand Proceedings: )  
Bell Operating Company Provision of )  
Enhanced Services )

CC Docket No. 95-20

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To: The Commission

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MAY 19 1995

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

**REPLY COMMENTS OF COMCAST CORPORATION**

Comcast Corporation ("Comcast"), by its attorneys, hereby submits its reply comments in the above-referenced proceeding.<sup>1/</sup> Comcast submits these reply comments to emphasize the importance of requiring separate subsidiaries for Bell Operating Company ("BOC") provision of video programming and competitive services.

**I. Introduction**

Comcast is the third largest cable operator in the United States. Because the BOCs now are permitted to provide video programming and they propose to do so through their local exchange facilities, Comcast has a significant interest in this proceeding. Comcast submits that the Commission must design rules suitable to be applied to BOC enhanced services and video programming offerings.<sup>2/</sup>

As shown below, BOC entry into video programming creates a high risk of anticompetitive behavior because of the high level of integration between local exchange and

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<sup>1/</sup> *Computer III Further Remand Proceedings, Notice of Proposed Rulemaking*, CC Docket No. 95-20, rel. Feb. 21, 1995 (the "Notice").

<sup>2/</sup> Under the Commission's definition of enhanced services, video programming provided through telephone facilities is one such service. See Telephone Company-Cable Television Cross-Ownership Rules, *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 5781, 5820-2 (1992).

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video programming operations. This makes it more likely that unseparated operations would result in anticompetitive behavior. Thus, BOC claims that the risk of anticompetitive behavior has not been proved for other enhanced services have little relevance to programming and other highly integrated services.<sup>3/</sup>

Separate subsidiaries will help to detect and prevent the kinds of anticompetitive behavior that will flow from the integration of video programming and LEC facilities. Therefore, separate subsidiaries are necessary to any program to police BOC provision of video programming and other enhanced services. However, a separate subsidiary requirement is only one of the safeguards needed to detect and prevent anticompetitive BOC behavior. Accounting rules are required as well. Only a complete package of safeguards will sufficiently reduce the risk of anticompetitive BOC behavior.

## **II. LEC Entry into Video Programming Poses a High Risk of Anticompetitive Behavior.**

Until now, whenever the Commission has faced the question of BOC offerings of enhanced services, it has not had to consider the effects of its decisions on the video programming market. Now, courts around the country have determined that BOCs and other LECs should be allowed to provide video programming. This change is profound because providing video programming greatly increases the risks of anticompetitive behavior. The risks of BOC provision of video programming are particularly high because of the way that

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<sup>3/</sup> In addition, as shown in the comments of MCI and others, the BOC claims that they have not engaged in anticompetitive behavior are incorrect. See Comments of MCI, *passim*.

the BOCs intend to provide that programming. They intend to create "integrated" facilities, combining video programming with common carrier services.<sup>4/</sup>

The BOC model for video services involves extensive construction for the express purpose of integrating video and traditional common carrier functions. The use of joint facilities also results in more shared operational costs, such as maintenance. Thus, the commingling of operations, and the resulting risk of anticompetitive behavior is much greater than for other enhanced services.

The BOC efforts to integrate their video operations into their more traditional common carrier services are no coincidence.<sup>5/</sup> The BOCs hope to take advantage of this integration to shift costs from their video programming endeavors to basic services ratepayers, at both the interstate and intrastate levels.<sup>6/</sup> Indeed, analyses provided to the Commission in response to Bell Atlantic's initial video dialtone tariff show that, company-wide, nearly \$4 billion in costs would be shifted to ratepayers annually under the terms proposed in that tariff.<sup>7/</sup>

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<sup>4/</sup> For instance, Bell Atlantic informed the Commission that its common carrier facilities in Dover, New Jersey would be part of a general upgrade of its telephone facilities.

<sup>5/</sup> See Comments of the Joint Parties, Telephone Company-Cable Television Cross-Ownership Rules, *Fourth Further Notice of Proposed Rulemaking*, CC Docket No. 87-266, filed March 21, 1995 ("Joint Parties Video Comments"), attached hereto as Exhibit 1.

<sup>6/</sup> *Id.* at 19-24.

<sup>7/</sup> See *Bell Atlantic (Tariff F.C.C. No. 10, Transmittal No. 741)*, Letter from Leonard J. Kennedy, *et al.*, Counsel for Adelphia Communications Corp., Comcast Cable Communications, Inc., Cox Enterprises, Inc. and Jones Intercable, Inc. to Geraldine Matise, Chief, Tariff Division, Common Carrier Bureau, Federal Communications Commission, 5 (May 15, 1995).

In addition, the integration of video programming and common carrier operations creates significant non-financial risks. For instance, integrated operations would give the BOCs' video programming affiliates access to residential customer proprietary network information ("CPNI"). This would be a significant advantage for the BOCs. An integrated BOC video operation could track, among other things, which customers call the local cable operator's customer service line, and then target those customers for the video operation's marketing efforts.<sup>8/</sup> This is not far-fetched BellSouth used its access to CPNI to market its voice messaging service to the customers of independent voice messaging providers.<sup>9/</sup>

BOC comments in this proceeding suggest the risk of anticompetitive behavior is low. They argue there is no evidence that there has been anticompetitive behavior under the non-structural safeguard regime. *See, e.g.,* Comments of NYNEX at 3. The BOC comments, however, fail to consider the specific concerns raised by the levels of integration proposed in BOC video facilities applications.<sup>10/</sup> As shown in the Joint Parties Video Comments, video programming is quite different from earlier enhanced services offerings,

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<sup>8/</sup> Tracking this information would be valuable to the video programming operation for two reasons. First, people who call the competing cable operator already are cable households, so they are likely to be interested in video services. Second, people who call a customer service line are more likely than other subscribers to be dissatisfied with their cable service, and therefore easier to convince to purchase the BOC's video services.

<sup>9/</sup> *See* Computer III Remand Proceeding, *Report and Order*, 6 FCC Rcd 7571, 7613-4 (1991) (describing behavior known as "unhooking").

<sup>10/</sup> The BOC comments also fail to account for the potential effects of telephone industry efforts to eliminate even the current level of scrutiny of their video proposals by eliminating the Commission's Section 214 and tariffing process for video services. *See, e.g.,* *Telcos' Lawsuit Challenges Requirements For Offering Cable TV Service, Cites First Amendment*, TELECOMMUNICATIONS REP., May 1, 1995, at 5-6.

especially in light of how BOCs propose to construct their video facilities. The BOC record during the initial *Computer III* regime shows they engaged in a consistent pattern of anticompetitive behavior. See Comments of MCI at 23-49. Thus, the increased risks created by BOC entry into video programming only reinforce the need for a forceful Commission response.

### **III. Separate Subsidiaries Are an Essential Safeguard for LEC Video Programming.**

Given the high risks of integrated BOC provision of video programming services, the Commission should adopt a separate subsidiary requirement to guard against anticompetitive behavior for programming and other enhanced services. At the same time, the Commission should retain other safeguards that will make it easier to prevent and detect anticompetitive behavior.

Separate subsidiaries are the most effective safeguard against anticompetitive behavior because they force all transactions between the BOC and its enhanced services operations into the open. They also make accounting rules more effective. Unseparated operations, on the other hand, lend themselves to concealment and to sharing information. Integrated marketing operations, in fact, practically assure that information obtained from a BOC's common carrier operations will be shared with enhanced services operations.

Separate subsidiaries are more effective than accounting safeguards standing alone because accounting safeguards depend upon the good faith application of a series of presumptions and allocation standards. The choices inherent in applying accounting and other non-structural safeguards lead BOCs to make decisions that favor their enhanced services

operations.<sup>11/</sup> Separate subsidiaries do not depend on a company's good faith because the company does not get to make any choices.

As various commenters explained, separate subsidiaries also have the dual effect of reducing incentives for anticompetitive behavior while making it easier to detect bad actors. *See, e.g.,* Comments of the Newspaper Association of America at 5; Comments of LDDS Communications, Inc. at 13. No accounting rule is as effective as a separate subsidiary. Audits, for instance, take place only after the fact, which makes it easier to conceal anticompetitive activity and harder for a regulator to impose meaningful penalties for noncompliance. Separate subsidiaries, on the other hand, are largely self-enforcing, and any violation is likely to be detected almost immediately.

A separate subsidiary requirement also is not unduly burdensome. While the BOCs tout the advantages of integration, most benefits to the BOCs result from the ability to engage in anticompetitive behavior. For instance, as described above, the availability of CPNI to BOC enhanced services operations presents a significant risk of abuse, and the entire advantage of access to CPNI for video programming operations is in its anticompetitive effect. *See infra* Part II.

While separate subsidiaries are an important element in the Commission's future regulation of BOC video programming and other enhanced services, the Commission should not rely on separate subsidiaries alone. As Comcast and other cable operators described in more detail in their comments on the Commission's *Fourth Further Notice* in the video dialtone proceeding, rules such as cost allocation, separations and audits of BOC

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<sup>11/</sup> In the regulated environment now faced by BOCs, even under price caps, there are incentives to shift costs to regulated operations and to shift revenues to unregulated operations because of the constraints on regulated profits.

compliance with regulatory requirements are crucial to the development of fair competition in video programming. *See* Joint Parties Video Comments, Exhibit 1 at 18-31. Applying these requirements to all aspects of BOC video programming services is as important as creation of a separate subsidiary. In effect, these rules are the mortar that will assure that the edifice of structural separation retains its integrity. These requirements provide the backup necessary to recognize and remedy any violations that may not be prevented by a separate subsidiary and therefore will increase the effectiveness of the separate subsidiary.

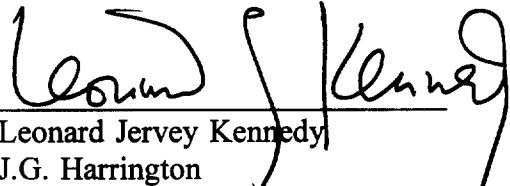
#### **IV. Conclusion**

The Commission should reinstate the separate subsidiary requirement for BOC provision of enhanced services. This requirement is particularly important for BOC provision of video programming, because the risks of anticompetitive behavior are especially high. At the same time, the Commission should recognize that separate subsidiaries must be supplemented by non-structural safeguards, including cost allocation and audit requirements. These additional requirements are necessary to assure the success of any regime of safeguards

for the provision of video programming services. Thus, Comcast respectfully requests that the Commission act in accordance with the positions taken herein.

Respectfully submitted,

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May 19, 1995

## **EXHIBIT 1**

**STAMP & RETURN**

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of

TELEPHONE COMPANY-  
CABLE TELEVISION  
Cross-Ownership Rules,  
Section 63.54-63.58

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CC Docket No. 87-266

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

**COMMENTS OF THE JOINT PARTIES**

**ADELPHIA COMMUNICATIONS CORPORATION**  
**COMCAST CABLE COMMUNICATIONS, INC.**  
**JONES INTERCABLE, INC.**  
**MID-COAST CABLE TELEVISION, INC.**  
**MULTIMEDIA, INC.**  
**SERVICE ELECTRIC CABLEVISION, INC.**  
**VISTA COMMUNICATIONS, INC.**

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**March 21, 1995**

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## **SUMMARY**

This proceeding has been initiated to determine how telephone companies should be regulated when they provide video programming directly to subscribers in their telephone service area. Specifically, should they be regulated as cable operators subject to the provisions of Title VI of the Communications Act of 1934? If so, should they also be subject to Title II of the Act as a video dialtone provider insofar as they make their facilities available for use by programmers other than themselves? Or, should they *only* be subject to Title II and be required, if they choose to provide their own programming, to lease channels on the same terms as other programmers on their video dialtone facility?

In answering these questions, the law and policy considerations point inexorably in the same direction. As a matter of law, telephone companies that provide video programming to subscribers over wireline facilities are cable operators providing cable service as those terms are defined by Title VI of the Act, and they must comply with all of the obligations, terms and conditions that Title VI imposes on such entities. The Commission previously has found, and has convinced the United States Court of Appeals for the District of Columbia Circuit, that a telephone company providing video dialtone is not subject to Title VI regulation *only* when it is not a program provider on its video dialtone facility. Implicit in the Commission's representations to the court, and in the court's decision, is the conclusion that a telephone company that provides programming over its own wireline facility is a cable operator subject to Title VI.

Title VI encompasses a series of mandatory legislative requirements, including but not limited to the requirement that providers of video programming over wireline

facilities obtain a local franchise. Indeed, the Cable Act was amended in 1992 to enhance competition by facilitating the award of multiple franchises in a given market. In light of this focused statutory revision designed explicitly to promote the award of additional franchises, it strains credulity to suggest that Congress contemplated, much less intended to allow the Commission to adopt rules that would circumvent and negate that franchising process.

Title VI regulation of LECs that provide video programming makes sense from a policy perspective as well. The type of facilities and services proposed by the LECs in their video dialtone applications resemble traditional cable services and facilities much more than the "enriched video common carriage" the Commission envisioned when it established the video dialtone regulatory framework. The failure of telephone companies to propose video dialtone service that allows customers to "dial up" a multiplicity of programmers is a function of technology and economics. It is apparent that the technology for a switched digital broadband network is, in the words of one LEC spokesman, "not ready for prime time." In addition, while a video delivery model based on common carriage principles may be attractive from a policy perspective, the LEC video dialtone applications prove it is untenable from a financial perspective.

Furthermore, any effort to regulate telephone companies and cable operators providing cable service under divergent regulatory frameworks would artificially skew or even preempt the development of facilities-based competition. Subjecting cable operators to Title VI regulation at the local and federal level imposes unique costs and burdens that are not imposed on Title II video dialtone providers and need not be so long as they do not

provide content. Moreover, while in theory subjecting telephone companies to Title II regulation or a hybrid of Title II and Title VI when they provide their video programming might be intended to foster competition between telephone companies and their *programmer* competitors on a video dialtone platform, it would, in fact, facilitate *anticompetitive* conduct by telephone companies vis-à-vis their *facilities-based* competitors, *i.e.*, cable operators, thereby jeopardizing fundamental public policy goals.

The provision of video programming by telephone companies via channels leased under Title II would facilitate anticompetitive behavior because of anomalies in the Commission's accounting rules. These deficiencies explain why every telephone company that could provide video programming as a cable operator subject to Title VI has decided instead to seek authority to provide programming on a common carrier video platform subject to Title II. A telephone company proposing to offer service as a cable operator would be required to isolate the fully allocated cost of the facilities used to provide cable service and move those costs off its regulated books to facilitate their recovery solely from its video customers. Of course, the same treatment would apply if a cable operator sought a channel leaseback arrangement with the telephone company. In each instance the regulator would seek to ensure that the costs of these video delivery ventures would not be borne by the general body of telephone ratepayers.

If the same service was to be offered as video dialtone service, however, the telephone company would be required to recover only the direct costs of the facilities plus some undetermined portion of overhead, which the Commission has stated can be something less than fully allocated cost. Consequently, the difference between "reasonable" overhead

costs and "fully allocated" overhead costs is shifted to telephone ratepayers under the Title II model. While this treatment may be appropriate for new *telephone* services, it is wholly irrational for new *video* services that are "fundamentally different" than the core services offered by a telephone company.

Moreover, even the benefits of fostering competition among programmers on a video dialtone platform will be illusory so long as: (1) technology does not facilitate the ability of subscribers to "dial up" programming from a multiplicity of sources on demand; and (2) telephone companies are able to structure their tariff offerings to discourage a multiplicity of individual programmers and packagers from leasing channels on the platform. At some point in the future, the technology may exist to permit such "dial up" services. For now, however, it is much more important to protect the prospect for facilities-based competition from being preempted by anticompetitive cross-subsidization than to seek to promote the distorted version of a video dialtone platform that the telephone companies are proposing today. And this can only be achieved by treating the telephone companies' video facilities as Title VI cable systems in their entirety, rather than by forcing telephone companies to provide their own video programming only over a Title II video dialtone facility.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
TELEPHONE COMPANY-	)	CC Docket No. 87-266
CABLE TELEVISION	)	
Cross-Ownership Rules,	)	
Section 63.54-63.58	)	

**COMMENTS OF THE JOINT PARTIES**

Adelphia Communications Corporation, Comcast Cable Communications, Inc., Jones Intercable, Inc., Mid-Coast Cable Television, Inc., Multimedia, Inc., Service Electric Cablevision, Inc. and Vista Communications, Inc. (collectively the "Joint Parties"), by their attorneys, hereby submit their comments in response to the Commission's Fourth Further Notice of Proposed Rulemaking in the above-referenced proceeding.<sup>1/</sup>

**I. INTRODUCTION**

In 1984, Congress enacted the Cable Communications Policy Act of 1984 (the "Cable Act") for the purpose of establishing "a national policy concerning cable communications." 47 U.S.C. § 601(1). The 1984 Act codified the Commission's authority to regulate cable systems as Title VI of the Communications Act of 1934 (the "Communications Act").<sup>2/</sup> As part of the Cable Act, Congress included a provision

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<sup>1/</sup> *Telephone Company-Cable Television Cross-Ownership Rules*, Fourth Further Notice of Proposed Rulemaking, CC Docket No. 87-266 (rel. January 20, 1995) (the "Notice").

<sup>2/</sup> Prior to 1984, the Commission regulated cable television systems as "adjuncts of the nation's broadcasting system" pursuant to its authority under Title I of the Communications Act. *Philadelphia Television Broadcasting v. FCC*, 359 F.2d 282 (D.C. Cir. 1966). The enactment of the Cable Act effectively eliminates the Commission's ancillary jurisdiction over cable under Title I and constrains it to those regulations required by Title VI.

prohibiting monopoly local exchange carriers from providing video programming directly to subscribers in their telephone service areas. 47 U.S.C. § 533(b). This statutory "telco-cable cross-ownership prohibition" codified rules the Commission first adopted in 1970. At the time it adopted the telco-cable cross-ownership provision, the Commission decided that absent an outright prohibition on telephone company provision of programming, telephone companies would have an overwhelming incentive and ability to discriminate against independent cable operators in granting access to telephone poles and conduit space.<sup>3/</sup>

Shortly after the statutory cross-ownership prohibition was enacted, the Commission reversed its position on the need for an outright prohibition on the provision of cable service by telephone companies. However, because the cross-ownership provision was now part of the Communications Act, the Commission determined that the only way to let telephone companies enter the video market was to allow them to build video facilities that others could use to provide programming to end users.<sup>4/</sup> The Commission envisioned this "video dialtone" as "an enriched version of video common carriage under which local telephone companies will offer various nonprogramming services in addition to the

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<sup>3/</sup> See *Applications of Telephone Common Carriers for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, Final Report and Order, 21 F.C.C.2d 307 (1970), *recon. in part*, 22 F.C.C.2d 746 (1970), *aff'd sub nom. General Telephone Company of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971).

<sup>4/</sup> *Telephone Company-Cable Television Cross-Ownership Rules*, Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry, 7 FCC Rcd 300 (1991) ("*First Report and Order*"), *recon.*, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 5069 (1992) ("*First Reconsideration Order*"), *affirmed*, *National Cable Television Association v. FCC*, 33 F.3d 66 (D.C. Cir. 1994) ("*NCTA*").

underlying video transport."<sup>5/</sup> The Commission concluded that the telephone company would not be required to obtain a cable franchise to provide video dialtone because programmer-customers, rather than the telephone company, would be providing video programming to subscribers.<sup>6/</sup>

The concepts were embodied in amendments to the Commission's rules adopted in 1992.<sup>7/</sup> Telephone companies now were permitted to own up to a 5 percent interest in an entity providing video programming to subscribers without violating the cross-ownership prohibition. For video dialtone providers, the Commission also eliminated the "carrier-user" restriction that previously had prohibited a telephone company from providing any service to cable operators or programmers outside of the carrier/customer relationship. The Commission ruled, however, that a telephone company could not, consistent with the statutory cross-ownership prohibition, provide programming to subscribers over the video dialtone facility.

This review of video dialtone policies is prompted by court decisions that have held that the statutory cross-ownership restriction contained in the Cable Act is

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<sup>5/</sup> *First Report and Order*, 7 FCC Rcd at 306.

<sup>6/</sup> *Id.* Video dialtone programmer-customers also would not be required to obtain a cable franchise because they would have no interest in the video delivery facilities and therefore would not satisfy the statutory definition of a cable operator. *Id.* at 327.

<sup>7/</sup> *Telephone Company-Cable Television Cross-Ownership Rules*, Second Report and Order, Recommendation to Congress and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 ("Video Dialtone Order"), *recon.*, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244 (1994) ("Video Dialtone Reconsideration Order").

unconstitutionally broad.<sup>8/</sup> From the first such court determination, Bell Atlantic and other local exchange carriers ("LECs") have claimed that these decisions require the Commission to permit LECs to provide their own programming to subscribers over video dialtone systems.<sup>9/</sup> The LECs also have argued that there is no reason to apply Title VI to their video program offerings because LECs providing video dialtone are simply common carriers providing transport to a variety of programmers and that many aspects of Title II and Title VI are duplicative or redundant and therefore superfluous. These arguments form the basis of the statutory application questions contained in the *Notice*.

As shown below, these arguments have no force when measured against the statutory requirements of the Communications Act. The statute requires the Commission to treat telephone companies like any other entity providing cable service over a cable television system and, consequently, does not permit the Commission to forebear from applying Title VI regulation to telephone companies. Moreover, video dialtone was created as a "back door" for LECs to enter the video market and it is questionable whether video dialtone should be preserved now that the "front door" (*i.e.*, provision of cable service) has been knocked down. Regulating LEC provision of programming exclusively under Title VI, rather than under Title II or a hybrid of Title II and Title VI, serves the public interest because it ensures that telephone ratepayers are not burdened with the costs of LEC investments in video services. Regulating telephone companies that provide video

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<sup>8/</sup> *Chesapeake and Potomac Telephone Co. v. United States*, 42 F.3d 181 (4th Cir. 1994); *U S West, Inc. v. United States*, No. 94-35775, D.C. No. CV-93-01523-BJR (9th Cir. 1994).

<sup>9/</sup> See e.g., *New Jersey Bell Telephone Co.*, File No. W-P-C 6840, Petition for Limited Reconsideration of Bell Atlantic (filed August 17, 1994).

programming under the same regulatory regime as cable operators that provide video programming also furthers the Commission's goal of promoting facilities-based competition for *all* telecommunications services.<sup>10</sup>

Regardless of what other steps the Commission takes to regulate telephone companies providing video programming, it also must institute a set of specific safeguards to protect telephone ratepayers and cable companies from telephone company cross-subsidization and other anticompetitive actions. Even when the LECs are competing in less significant markets than video programming they have had a history of abusing their local telephone monopolies. LEC entry into video markets greatly increases the risk of such behavior. To combat likely LEC misbehavior and protect consumers, the Commission should enact more stringent requirements for video programming, including separate subsidiaries, accounting safeguards and additional requirements to guard against the abuse of customer proprietary network information by LECs.

**II. THE COMMISSION HAS NO AUTHORITY TO WAIVE OR TO ALTER THE STATUTORY REQUIREMENTS OF TITLE VI.**

In the *Notice*, the Commission asks two questions with regard to application of Title VI to a LEC that provides video programming over its video dialtone platform: (1) Does the Commission have authority to impose some, but not all, Title VI obligations on

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<sup>10</sup> Even the telephone industry acknowledges that cable operators and telephone companies should be regulated under similar regimes when they provide similar services. *See House Bill May Keep Some Cable Regulation*, *Communications Daily*, February 8, 1995 at 3 (USTA president Roy Neel stated "where regulation exists there should be parity . . . It's not reasonable for a cable company to come in and provide telephone service with different regulation while you're stuck with [traditional telephone regulation]").

LECs, and (2) Would application of some or all of the provisions of Title VI be duplicative of, or inconsistent with, federal or state regulation of common carriage. *Notice* at ¶ 15. The Commission need only answer the first question, however, because the Commission is without discretion and must enforce Title VI against LECs that provide video programming over facilities they own or control.<sup>11/</sup>

The conclusion that a telephone company must comply with the statutory requirements for cable service when it provides cable service is unsurprising. If a telephone company acquires a broadcast station, as Bell Atlantic has considered, it must comply with the Title III requirements applicable to broadcasting.<sup>12/</sup> When a cable operator provides interstate common carrier services, it must comply with the statutory requirements of Title II. In short, the Communications Act regulates communications services based on the type of service provided, not based on the identity of the entity providing the service. It is curious then, that the *Notice* even asks whether a telephone company that provides cable

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<sup>11/</sup> Consequently, the Commission has abdicated its statutory responsibilities in the two decisions in which it has allowed LECs to provide video programming without complying with Title VI. See *Chesapeake and Potomac Telephone Co.*, File No. W-P-C 6834, FCC 95-15 (rel. January 20, 1995) petition for review pending sub nom. *Chesapeake and Potomac Telephone Co. v. FCC.*, No. 95-1157 (D.C. Cir. filed March 10, 1995); *BellSouth Telecommunications, Inc.*, File No. W-P-C 6977, DA 95-181 (rel. February 8, 1995) petition for review pending sub nom. *BellSouth Telecommunications, Inc. v. FCC.*, No. 95-1129 (D.C. Cir. filed Feb. 23, 1995). Moreover, because failure to enforce Title VI is violative of the Communications Act, the Commission cannot claim to base this action on its intent to fulfill its Title II mandate. As Section 214 plainly states, the Commission may only approve video dialtone applications that promote the "public convenience and necessity." By definition, unlawful acts do not satisfy this standard.

<sup>12/</sup> *Bell Atlantic Won't Be Next CPB; Jones Would Like to Be Next PBS*, Communications Daily, January 24, 1995 at 1 (Bell Atlantic would be interested in acquiring certain public television stations but cannot unless Congress abolishes rules barring private ownership of those stations).

service should be subject to the statutory requirements applicable to cable service. As shown below, telephone companies must be regulated under Title VI when they provide video programming over wireline facilities to subscribers in their telephone service area.

**A. LECs that Provide Programming over Their Own Wireline Facilities Are Subject to Title VI.**

It is well established that the Commission, like all regulatory bodies, must interpret a statute in a manner that carries out the intent of Congress.<sup>13/</sup> The starting point in determining Congressional intent is the statutory language chosen by Congress.<sup>14/</sup> When the intent of Congress can be gathered from the plain meaning of the statutory language, an agency is without authority to interpret the statute in any other manner.<sup>15/</sup> As the Supreme Court recently admonished, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."<sup>16/</sup>

Congress enacted Title VI for the purpose of "establishing a national policy concerning cable communications," 47 U.S.C. § 521, and Title VI is the sole source from

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<sup>13/</sup> See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Illinois Bell Telephone Co. v. FCC*, 966 F.2d 1478, 1481 (D.C. Cir. 1992).

<sup>14/</sup> See, e.g., *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) ("It is axiomatic that the starting point in every case involving construction of a statute is the language itself").

<sup>15/</sup> "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 482-83.

<sup>16/</sup> *MCI Telecommunications v. AT&T*, 114 S.Ct. 2223, 2231 (1994); see also *Illinois Bell*, 966 F.2d at 1481 ("we apply *Chevron* deference only where the intent of Congress is unclear and the agency's interpretation is a reasonable one. Here, we get off at the first stop. The intent of Congress is clear.").

which the Commission derives authority to regulate the provision of cable service.<sup>17/</sup> As the D.C. Circuit recently found, "the singular focus on the regulation of cable systems holds throughout the Act."<sup>18/</sup> The court acknowledged, however, that Title VI is not applicable to all providers of video programming.<sup>19/</sup> Rather, the scope of Title VI is limited to those entities that satisfy the statutory definition of "cable operator." 47 U.S.C. § 522(5). That term is defined by the statute to include any person who provides "cable service" over a "cable system," two terms which also are defined by the statute. 47 U.S.C. §§ 522(6), (7).

The Act defines "cable service" as:

(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming, or other programming service.

47 U.S.C. § 522(6).

To date, the programming services LECs have proposed to offer over their video dialtone networks fall squarely within this definition.<sup>20/</sup> Further, the LEC wireline facility that carries the LEC programming is a "cable system" as that term is defined in the statute. The Act defines a cable system as:

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<sup>17/</sup> Prior to adoption of the Cable Act the Commission regulated cable operators pursuant to its ancillary jurisdiction under Title I, but that Title I authority was eliminated with the adoption of Title VI. See n.2 supra.

<sup>18/</sup> *American Scholastic TV Programming Foundation v. FCC*, Case No. 93-1652, slip op. at 17-18 (D.C. Cir Feb. 10, 1995) ("American Scholastic").

<sup>19/</sup> *Id.* at 12 ("we take as a given the Commission's rule that wireless cable is not a 'cable system' within the meaning of the Act").

<sup>20/</sup> See H.R. Rep. No. 98-934, 98th Cong., 2d sess. at 41 (1984).

[A] facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include . . .  
(C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers . . .<sup>21/</sup>

With certain prescribed exceptions, such as the limited exception for common carrier facilities cited above, none of the relevant statutory definitions is contingent on the identity of the person providing service. Rather, the only relevant factors are the type of service provided to subscribers (*i.e.*, is the service video programming?), the technological means of providing that service (*i.e.*, is the service provided over a wired facility?) and the ownership or control of the facility (*i.e.*, does the entity providing service have an interest in the facility?). Indeed, the NCTA court confirmed this view when it observed that a telephone company providing video programming under the exceptions to the cross-ownership ban is a cable operator. NCTA, 33 F.3d at 74. Because the scope of Title VI is unambiguous on its face, the Commission is legally required to enforce the statutory provisions against any person providing video programming over a wired facility that it owns or controls.

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<sup>21/</sup> 47 U.S.C. §522(7). Any suggestion that a video dialtone network does not meet the definition of a "closed transmission path" is not well founded in the statute. The term "closed transmission path" distinguishes between radio frequency technologies such as MMDS and DBS which are not subject to Title VI, and wired services, which have defined routes for transmission of programming. *American Scholastic*, supra, at 12. The fiber and hybrid fiber-coax system architectures all LECs have selected as their networks of choice for video transmission employ closed transmission paths just like cable systems in use today throughout the cable industry.